Supreme Court, U. S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-1601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GEORGE SUMNER, Warden of the California State Prison at San Quentin,

Petitioner,

v.

ROBERT MATA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I

Whether a party may litigate procedural questions before this Court that have either never been raised below or have been raised only after decision in the Court of Appeals and therefore have not been reached by the Court of Appeals.

II

Assuming such questions can be decided by this Court, whether a defendant convicted in state court is barred from obtaining review on federal habeas corpus under *Wainwright v. Sykes*, 433 U.S. 72 (1977), where, despite a failure to object at his trial in state court, the state appellate court reaches and decides his contentions on their merits.

III

Again assuming the question can be reached in this Court, whether a federal Court of Appeals' conclusion that an identification procedure is unduly suggestive and so unreliable as to offend federal due process constitutes a mixed question of fact and law which a federal court is obliged to decide independent of any state court determination, or whether it is a finding of fact as to which a federal court must, under 18 USC section 2254(d), defer to state court.

IV

Whether under this Court's totality of the circumstances test in eyewitness identification cases, a court may consider the unnecessary failure of police officials to conduct a line-up when the identifying witness insists that a line-up is the only reliable method of identification.

V

Whether, under this Court's totality of the circumstances test in eyewitness identification cases, a court may consider conduct of the police tending to focus the witness' attention on a particular subject.

VI

Whether the identification procedures utilized in this case were unduly suggestive and unreliable.

TOPICAL INDEX

STATEMENT OF THE CASE 2

A. Statement of Facts 2

SUMMARY OF ARGUMENT 7

ARGUMENT

I. Because Petitioner Has Failed To Raise His Procedural Arguments In A Timely Fashion Below, This Court Should Not Consider Them. If The Court Does Reach The Merits Of Petitioner's Procedural Arguments They Should Be Rejected 10

A. Trial Counsel's Failure to Object to the Photo Identifications in State Court 10

1. Because the Failure to Object Was Never Argued Below as a Basis for Binding There Had Been No Exhaustion, it Cannot be Advanced Here 11

2. Assuming the Court Can or Should Hear the Argument on its Merits, There is No Principled Reason to Hold that a Defendant Fails to Exhaust His State Remedies When a State Appellate Court Reaches a Federal Constitutional Question Which Was Not the Subject of Objection in State Trial Court 14

B. The Court of Appeal's Alleged Failure to Defer to State Court Findings of Fact 17

II. Because The Unnecessary Failure To Conduct A Line-Up Was, On The Facts Of This Case, Relevant To The Question Whether The Witness' Identifications Were The Product Of Suggestion And Were Unrealiable, The Court of Appeals Properly Considered Such Lack of Necessity 20

A. The Totality of Circumstances Test as Applied in This Court and as Understood by the Ninth Circuit Permits Con-

sideration of All Factors Relevant to Reliability 21

B. Necessity Has Been Considered as Part of the Totality of the Circumstances in the Identification Cases of This and Other Courts 24

C. On This Record, The Unnecessary Failure To Conduct A Line-up Was A Factor Related To Reliability 28

III. The Court Of Appeals Properly Considered Polict Conduct Tending To Focus The Witness' Attention On A Particular Subject 33

IV. The Court Of Appeals Correctly Decided That The Identification In This Case Was Unreliable 43

CONCLUSION 52

TABLE OF AUTHORITIES CITED

Cases:

Brown v. Allen, 344 U.S. 443 (1953) 18

California v. Taylor, 353 U.S. 553 (1957) 11

Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (D.C. Cir. 1968) 26

Coleman v. Alabama, 399 U.S. 1 (1970) . . . . . ,25, 35

Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968) cert. denied 397 U.S. 973 (1970) 14

Cuyler v. Sullivan, ___ U.S. ___, 64 L.Ed.2d 333 (1980) 19

Dorszynski v. United States, 418 U.S. 424 (1974) 11

Duignan v. United States, 274 U.S. 195 (1927) 14

Fay v. Noia, 372 U.S. 391 (1963) 14, 15

Flemmi v. Gunter, 410 F.Supp. 1361 (D. Mass. 1976) 19

Cases, continued: Page

Foster v. California, 394 U.S. 440 (1969) 25, 40

Frank v. Blackburn, 605 F.2d 910 (5th Cir. 1979) 26, 27, 35

Government of Virgin Islands v. Petersen, 553 F.2d 324 (3d Cir. 1977) 26

Green v. Loggins, 614 F.2d 219 (9th Cir. 1980) 23, 42

Gunsby v. Wainwright, 596 F.2d 654 (1979), cert. denied, 100 S.Ct. 307 (1980) 19

Hale v. Henderson, 485 F.2d 266 (6th Cir. 1973) 14

Imbler v. California, 424 F.2d 631 (9th Cir. 1970), cert. denied, 400 U.S. 865 18

Irvin v. Dowd, 359 U.S. 394 (1959) 14

Israel v. Odom, 521 F.2d 1370 (7th Cir. 1979) 26

Jenkins v. Anderson, ___ U.S. ___, 65 L.Ed.2d 86 (1980) 11, 12

Lamb v. Zahradnick, 452 F.Supp. 372 (D. Va. 1978) 19

Manson v. Brathwaite, 432 U.S. 98 (1977) ..... *passim*

Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976) 18

Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979) cert. granted, 65 L.Ed.2d 1139 (1980) 23

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Neil v. Biggers, 409 U.S. 188 (1972) 34

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Parker v. Swenson, 332 F.Supp. 1225 (E.D. Mo. 1971), cert. denied, 409 U.S. 1126 (1973) 34

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People v. Andrews, 14 Cal.App.3d 40, 92 Cal.Rptr. 49 (1949) 16

Cases, continued: Page

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People v. Ibarra, 60 Cal.2d 460, 340 Cal.Rptr. 863 (1963) 16

People v. Kramer, 227 Cal.App.2d, 38 Cal.Rptr. 487 (1964) 16

People v. Mahoney, 201 Cal. 618 (1927) 16

People v. Matteson, 61 Cal.2d 466, 39 Cal.Rptr. 1 (1964) 16

People v. Underwood, 61 Cal.2d 113, 37 Cal.Rptr. 313 (1964) 16

Rummel v. Estelle, ___ U.S. ___, ___, n.7, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980) 12

Simmons v. United States, 390 U.S. 377 (1968). . . . . *passim*

Smith v. Coiner, 473 F.2d 877 (4th Cir. 1973) cert. denied, 414 U.S. 1115 (1974) 33

Smith v. Digmon, 434 U.S. 332 (1978) 11

Stovall v. Denno, 388 U.S. 293 (1967) 23, 32, 33

Townsend v. Sain, 372 U.S. 293 (1963) 18

United States v. Allison, 616 F.2d 779 (5th Cir. 1980) 27

United States v. Ballard, 423 F.2d 127 (5th Cir. 1970) 27

United States v. Barnes, 610 F.2d 888 (D.C. Cir. 1979) 17

United States v. Baxter, 492 F.2d 150 (9th Cir. 1973) 26

United States v. Calhoun, 542 F.2d 1094 (9th Cir.), cert. denied, 429 U.S. 1064 (1976) 26

United States v. Cook, 608 F.2d 1175 (9th Cir. 1979), cert. denied, 100 S.Ct. 706 (1980) 23

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Cases, continued: Page

United States v. Dailey, 524 F.2d 911 (8th Cir. 1975) 26, 36

United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. denied, 421 U.S. 1016 (1975) 25, 27

United States v. Field, ___ F.2d ___ (No. 79-1533, 9th Cir. August, 1980) 22, 36, 39, 42

United States v. Lovasco, 431 U.S. 783 (1977) 11, 18

United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), cert. denied, 434 U.S. 1015 27

United States v. Mears, 614 F.2d 1175 (8th Cir. 1980) 35

United States v. Peele, 574 F.2d 489 (9th Cir. 1978) 26

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United States v. Sanchez, 603 F.2d 381 (2d Cir. 1979) 35

United States v. Santana, 427 U.S. 38 (1976) 11

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Warden v. Hayden, 387 U.S. 294 (1967) 14

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Texts:

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Texts, continued: Page

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BRIEF FOR THE RESPONDENT

Respondent accepts the recitations in the Brief for Petitioner covering the opinion below, the jurisdictional basis for this Court hearing the case, the constitutional and statutory provisions involved, and the chronology of the statement of proceedings in state and federal court.

STATEMENT OF THE CASE

A. Statement of Facts

Respondent, Salvador Vargas and David Gallegos were convicted of first degree murder in Kern County Superior Court for the killing of Leonard Arias while all were inmates at the California Correctional Institute at Tehachapi, California (hereinafter "Tehachapi"). The killing was alleged to have occurred on October 19, 1972.

No murder weapon was ever found, and no physical evidence existed linking any of the defendants to the murder.[1] The prosecution's case rested almost entirely on the testimony of three inmates, Rigoberto Almengor, Florence J. Allen and Paul Childress, who claimed to have witnessed the homicide.

The identifications made by the witnesses occurred after a series of photo identification sessions, which are discussed in detail in the body of the argument of this brief. The evidence presented at trial was as follows.

Childress was confined to the same dormitory in Tehachapi as Arias, Almengor and Allen. He testified that on October 19, 1972 as he emerged from the bathroom in the dormitory he saw a scuffle involving *only* Arias and the three defendants. He testified that he knew both Almengor and Allen and that he did not see either one of them at the scene. (J.A. 29; RT 328.) Although he claimed to have a clear view of the incident, he saw no knives being wielded, and in fact did not know a knife fight was in progress until he saw

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[1] Although clothes, a knife, and grass shears were found (RT 659, 660-61) no testimony was presented linking these items to the defendants.

a knife fall to the floor (J.A. 29-30; RT 330). He testified that upon seeing the incident, he went back to his own bunk, put away the belongings he had taken with him to the bathroom and stood up. This all consumed about two or three minutes and only after this did he see the assailants fleeing the scene (J.A. 31; RT 346). At first Childress said nothing to anyone regarding what he had seen. However, after being approached by a group of males of Mexican descent, Childress became nervous and went to the authorities (RT 283-84, 948). He indicated the nickname and the first name of two of the people he thought had committed the crime (J.A. 21; RT 285) and the officer in charge took single pictures of Mata and Gallegos out and asked Childress if these were the men he had in mind (RT 676). Childress agreed that they were and then went through a rolodex of inmate pictures and chose Vargas as the third assailant. At trial, Childress indicated that on October 19 Gallegos did not have a mustache (J.A. 24; RT 287). Exhibit 24 which includes a photograph of Gallegos taken on October 27 shows Mr. Gallegos with a mustache. Childress was placed in segregation after he identified the defendants. While there he saw all three defendants (J.A. 25; RT 289).

Childress' story is impeached in important respects by Almengor and Allen both of whom testified that they were "shoulder to shoulder" with Arias at the time of the killing. In addition, Gary Darke, who occupied the bunk nexg to Childress at the time of the incident testified that when the stabbing occurred he and Childress were actually playing cards and were out of the view of the killing (RT 1093).

Almengor testified that he was on parole at the time of the trial (J.A. 31; RT 366). He did not go to the

investigating authorities willingly but was taken into their custody as a suspect. After the killing he found his clothing covered with blood (J.A. 47; RT 385). At that point he went back to the area of his own bed, changed immediately into a full set of different clothes, took off his shoes, and threw them a few bunks away. He then went into the restroom, washed his hands, using a ruse with one of the guards to do so. (J.A. 48; RT 385-86.) When the officers searched the dormitory and found the pants which had been discarded, Almengor still did not come forward. He waited until guards tried his pants on sixteen other inmates, and ultimately proved to fit only him before he volunteered that he would be "glad" to assist the officers. (J.A. 58; RT 396.) Almengor indicated that he was near-sighted and not wearing his glasses. (J.A. 67; RT 450.) He also had a long history of glue sniffing and had in fact been apprehended on three separate occasions sniffing glue while at Tehachapi (J.A. 66; RT 449).

Almengor stated that the witnesses standing by the bulletin board turned around "real fast" (J.A. 37; RT 376.) Almengor took a few steps away from the victim and as the attack started the only inmate he was looking at was the "third man," the "tall one" thought to be Vargas. As the fight broke out he saw the third individual "slooped and pulled away" (J.A. 40-1; RT 379-80), saw stabbing motions being made quickly at Arias and heard Allen screaming for people to come help (J.A. 46; RT 383). At this same moment, Almengor testified that Mata appeared to "rush me with a knife" (J.A. 40-1; RT 380). Almengor defended himself by blocking the blow and throwing a kick which pushed the assailant quickly to the door at the other end of the corridor at least six feet away (J.A.

41; RT 380). At this point Almengor indicated that he looked eye to eye at his assailant. (J.A. 115; RT 742.) The attacker then turned and ran out, his back toward Almengor.

Allen was a member of the Nuestra Familia (J.A. 180; RT 1157). He was also on parole at the time of the trial (RT 583). He testified that he was right next to Arias when the incident happened (J.A. 75; RT 586) and was distracted at the time of the attack. His testimony was that he was "glancing up" while buttoning his denim jacket when the attack on Arias broke out (J.A. 79, 75; RT 612, 586). Once the fight started, Allen's main purpose was in his words "trying to keep from getting killed." (J.A. 75; RT 586.) He stated that he did not see Mata or Gallegos "that good" (J.A. 76-7; RT 587) since the third man, identified as Vargas, leaped at Allen and jabbed his knife toward him, cutting Allen's sleeve and scratching the skin on his forearm. Allen stepped back a few steps and started yelling for help (RT 389). Allen testified that his attention during the fight was drawn to the man with the big knife who "pretty well occupied [his] attention" and that he was "looking at the knife" rather than the face of the assailant (J.A. 80; RT 614).

All three witnesses and all three defendants were placed in segregation after the incident. They remained in segregation at least until the 30th of October. During this period of time inmates were led out to an exercise area one at a time and could be viewed by the other segregated inmates. (RT 361, 441, 594.) The prosecution also called Carlos Ortega who testified that Mata and Vargas had approached him prior to the arrival of Arias and asked that Arias be "hit." He testified that he tried to "cool it" with Mata and Gallegos. Ortega

admitted that he had committed perjury on other occasions in court, that he had himself stabbed people (RT 882) and that he had testified in another proceeding in Los Angeles and that in that proceeding the subject of the October 19, 1972 Tehachapi killings had come up and that Ortega had never mentioned that any of the three defendants had been involved in the incident. He had, however, named "Bogus Pete" Nunez, a figure initially identified by Almengor, as one of the killers (RT 872). Moreover, Ralph Renteria, chairman of a prison-sanctioned organization for inmates of Mexican descent disputed Ortega's entire account of the history of the Mexican Mafia, of Ortega's knowledgability of the Mexican Mafia, and of Ortega's self proclaimed role as "chief" of the Mexican Mafia (RT 1067).

The defense called the following witnesses: Jerry Wayne Sanford who testified that he was asleep in his bunk when he was awakened about 1:45 p.m. and told that there had been a stabbing. When he woke up Mata was sitting on Mata's own bed playing chess with an inmate with whose name he believed to be Russell (RT 1016). In his closing argument the district attorney admitted that "I don't really have anything damaging to say about [Sanford]" (J.A. 180; RT 1279).

Similarly William Bustills about whom the district attorney also conceded he had no adverse information (J.A. 180; RT 1279) testified that after lunch and before recall on October 19 Mata was playing cards about three bunks away from Bustills' bunk with a "white boy" named "Russ." (RT 1106.) In addition, the defense called a court-appointed licensed investigator named James Leon Faulkner who recounted an interview he had had with Allen on November 22,

1972, in which Allen had indicated that the jackets of the assailants were pulled up and the hats were pulled down, that only one had a mustache, that he was unable to identify any of them and that indeed they might even have been Caucasian. (J.A. 175; RT 1117.) According to Faulkner, Allen had "stated that at this time, that from the time the incident occurred until the time I interviewed him, that he had never gotten a look; he had never been able to observe any of the assailants to the extent where he could identify them." (J.A. 176; RT 1118.) Faulkner stated that Allen had told him that he had seen all three defendants being taken out of segregation together at one time to be rephotographed and that "he assumed that since they were the only ones in segregation that they were on the chart, the photographic chart he was shown at a later time—that they must be the ones that did it." (J.A. 177; RT 1119.) Faulkner further stated that Allen had told him that he was "due to be released, and that if he didn't cooperate with the people from the Department of Corrections that he wouldn't be released at his date that he was due." (J.A. 178; RT 1119.) Mata also called Reuben Leon Schoo who confirmed the testimony of the two prior inmates that Mata was in his dorm playing chess with Russell at the time of the incident. (RT 1128 *et seq.*)

SUMMARY OF ARGUMENT

Petitioner's Procedural Arguments

Petitioner has failed to present either of his procedural arguments to the Court of Appeals in a timely fashion. Under principles long-settled in this Court, petitioner is therefore not entitled to review of the procedural questions he tenders here. Not until the

petition for writ of certiorari did petitioner contend that *Wainwright v. Sykes*, 433 U.S. 72 (1977) precluded review of the eyewitness identification contention respondent advanced in the lower courts. The argument that 18 USC section 2254(d) precluded the federal courts from relitigation of what petitioner deems to be state court findings of fact was not presented to the Court of Appeals until the Petition for Rehearing. Under these circumstances petitioner's arguments should not be considered by this Court.

On their merits the procedural arguments have no substance. Where a state appellate court reaches the merits of a contention that was not the subject of an objection at trial, the state court has construed state law to forgive the failure to object. No principle of comity or federalism requires a federal court to invoke the state's contemporaneous objection rule under such circumstances.

Even if petitioner's argument based on 18 USC section 2254(d) could be reached on its merits, that section has no relevance here. Section 2254(d) requires federal court deference only to a state court's finding of primary historical fact. It does not require deference to the conclusions to be drawn from those facts. In this case the Court of Appeals' decision involved only legal conclusions such as whether the procedures used were "suggestive" or whether the witnesses were "unduly influenced" or whether the identification process was constitutionally "fair."

Petitioner's Arguments on the Merits

Petitioner has adopted a wooden approach in the face of the flexible rules established by this Court in eyewitness identification cases. In *Manson v. Brathwaite*, 432 U.S. 98 (1977) and *Neil v. Biggers*, 409 U.S. 188 (1972) this Court required that all factors considered by a court passing on the constitutional propriety of a particular eyewitness identification be tied to reliability. But in passing on those factors *all* circumstances related to reliability were to be considered. Notwithstanding this test, petitioner has argued that in no case should a court be permitted to consider the unnecessary failure to conduct a line-up, or the conduct of police officers conducting the identification which might have focused the witness' attention on a particular individual, or the presence of other witnesses at the time the identification is made. Petitioner's approach is at odds with the "totality of the circumstances" test adopted in *Manson, Neil* and earlier cases in this Court.

This case illustrates the point. For example, here one of the witnesses insisted he could not make a valid identification from photographs but had to see a line-up. Under circumstances such as that, it is obvious that the failure to conduct a line-up is relevant to the question of reliability. The witness himself is saying that the photographs are in effect unreliable and that a line-up would be reliable. That fact surely is relevant and ought to be considered by a court.

The fact is, the Court of Appeals had no choice but to reverse this conviction. The identification procedures were unnecessarily suggestive and led to an extraordinarily unreliable identification.

ARGUMENT

I

BECAUSE PETITIONER HAS FAILED TO RAISE HIS PROCEDURAL ARGUMENTS IN A TIMELY FASHION BELOW, THIS COURT SHOULD NOT CONSIDER THEM. IF THE COURT DOES REACH THE MERITS OF PETITIONER'S PROCEDURAL ARGUMENTS THEY SHOULD BE REJECTED.

Petitioner's handling in the lower courts of the two procedural arguments he tenders here has been inconsistent, confused, and misleading to those courts. His first procedural argument is raised for the first time in this Court and his second was not presented in the Ninth Circuit until after the case had been decided. Under these circumstances, this Court should not consider the arguments.

Although petitioner's failure to preserve his procedural arguments disposes of them, we nonetheless demonstrate that on their merits the claims have no substance. With respect to petitioner's first argument we see that the state Court of Appeal did review respondent's federal constitutional claim on its merits and therefore that no principle of comity or federalism is served by a federal court declining to review the claim. With respect to petitioner's second procedural argument that the Ninth Circuit did not defer sufficiently to state court findings of fact we point out that the decision here under review resolved a question of "mixed law and fact" which the federal courts were obliged to decide independent of any state court determination.

We treat petitioner's procedural arguments *seriatim*.

A. Trial Counsel's ailure to Object to the Photo Identifications n State Court.

Petitioner first contends that trial counsel's supposed deliberate tactical choice not to object to the suggestiveness of the photo identifications at trial should be deemed a failure to exhaust remedies notwithstanding the fact the California Court of Appeal disposed of the identification question on its merits. Before demonstrating that the contention enjoys neither the support of logic nor the benefit of precedent, we point out that this is the first court anywhere during this litigation that has ever been presented with this argument. Under these conditions the issue is not properly before this Court and should not be considered by it.

1. Because the Failure to Object Was Never Argued Below as a Basis for Finding There Had Been No Exhaustion, it Cannot be Advanced Here.

The rule in this Court is that issues that have not been briefed and argued in the courts below will not be decided for the first time in the Supreme Court in the absence of exceptional circumstances. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 788-89 n.1 (1977); *United States v. Santana*, 427 U.S. 38, 41 n.2 (1976); *Dorszynski v. United States*, 418 U.S. 424, 431 n.7 (1974); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). *See also Smith v. Digmon*, 434 U.S. 332, 334 (1978) (Rehnquist, J. concurring).

In *Jenkins v. Anderson*, ____ U.S. ____, 65 L.Ed.2d 86 (1980) this Court recently applied this principle to the identical contention being advanced here. There as here the state sought to argue that trial counsel's failure to object in state court precluded federal review under *Wainwright v. Sykes*, 433 U.S. 72 (1977). Noting that

the state had failed to raise the *Sykes* question in the lower federal courts, this Court declined to review it on certiorari, stating:

> "Considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches this Court. The applicability of the *Sykes* 'cause' and 'prejudice' test may turn on an interpretation of state law. *See Rummel v. Estelle,* ____ U.S. ——, ——, n.7, 63 L.Ed.2d 382, 100 S. Ct. 1133 (1980). This Court's resolution of such a state law question would be aided significantly by the views of other federal courts that may possess greater familiarity with [state] law. Furthermore, application of the 'cause' and 'prejudice' standard may turn on factual findings that should be made by a District Court. Accordingly, we do not consider the *Sykes* issue in this case." (65 L.Ed.2d at 92 n.1.)

Jenkins is controlling here. In their return to the District Court's order to show cause, the Attorney General made no argument that trial counsel's failure to object in state court in any way affected his right to be in federal court on the identification question. (J.A. 00, Return pp. 1-2, 6-10.) The only context in which trial counsel's failure to object was noted by the Attorney General was in connection with Mata's argument that he had been denied the effective assistance of counsel because no effort had been made at trial to suppress the identification of witnesses Almengor and Allen (*see* J.A. 184, 203, Petition for Writ of Habeas Corpus, U.S. District Court, 16-18; Return p. 14.) In that connection the Attorney General made no argument that failure to object had worked a "procedural default" against Mata, but only that his failure to raise the *incompetence issue* on the direct appeal of his conviction to the California

Court of Appeal was fatal in Federal Court. This argument, ultimately rejected by the District Court and never renewed in the Ninth Circuit, was of course different from the argument petitioner now makes here.

Not only did the Attorney General fail to present the lower courts with the argument he now makes here, when requested by the District Court to certify whether Mata had exhausted state remedies, the Attorney General indicated: "we state that petitioner has exhausted state remedies." (*See* J.A. 206, Declaration of Jamie Jacobs-May.) In the same document the Attorney General cited *Wainwright v. Sykes* to the District Court and argued from it for the first time that *Sykes* foreclosed review of the competence issue and of another issue Mata has since abandoned. Thus, although petitioner was aware of *Sykes* and made arguments from it, he certified to the District Court that there had been sufficient state court exhaustion and he deliberately made no *Sykes* argument on the identification question.

When the case reached the Ninth Circuit no argument was presented in appellee's brief or in the Petition for Rehearing and Suggestion for Rehearing En Banc that trial counsel's failure to object in any way precluded the federal courts from reaching the merits of the identification claim. *Sykes* was not cited at all in the Ninth Circuit and no argument was presented on any issue in that Court which even suggested there had been a procedural default against Mata in state court. The first appearance of the argument in any form therefore was before this Court on the petition for writ of certiorari.

As this Court noted long ago "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). There are no exceptional circumstances in this case. Petitioner had had every opportunity to present his claims below and has not availed himself of those opportunities. This Court should decline to reach the question on its merits.

2. Assuming the Court Can or Should Hear the Argument on its Merits, There is No Principled Reason to Hold that a Defendant Fails to Exhaust His State Remedies When a State Appellate Court Reaches a Federal Constitutional Question Which Was Not the Subject of Objection in State Trial Court.

As petitioner appears to recognize, the position he urges here on the merits does not enjoy the support of authority. For the cases in this Court strongly suggest, and the cases in the Courts of Appeal directly hold that state exhaustion requirements are satisfied when a state appellate court has passed on the merits of a claim even though the claimant had failed to object in the trial court. *See, e.g., Warden v. Hayden*, 387 U.S. 294, 297 n.3 (1967); *Fay v. Noia*, 372 U.S. 391, 439 (1963); *Irvin v. Dowd*, 359 U.S. 394, 406 (1959); *Curry v. Wilson*, 405 F.2d 110, 112 (9th Cir. 1968), *cert. denied* 397 U.S. 973 (1970); *Hale v. Henderson*, 485 F.2d 266, 269 (6th Cir. 1973), *cert. denied* 415 U.S. 930 (1974); *Partida v. Castenada*, 524 F.2d 481, 483 (5th Cir. 1975), affirmed sub nom. *Castenada v. Partida*, 430 U.S. 482 (1977). The position adopted by these cases is bottomed on those principles of comity which formed the basis for the exhaustion requirement in the first

place. As this Court noted in *Fay v. Noia, supra*, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct the constitutional violation." It follows that where the state court *has* passed upon the merits of a claim, it has seized the opportunity to correct the constitutional violation and that no principle of federalism or comity requires the federal court to stay its hand. In such a situation the state courts have pronounced themselves untroubled by any defects in state procedure and in so doing have, in effect, authoritatively construed a question of state law. In other words, whether the failure to object in state trial court forecloses review on the merits in a state appellate court is obviously a question of state law.

Petitioner seeks to avoid the impact of these cases by urging this Court to read the State Court of Appeal's ruling on the merits of the identification question as a mere "gratuity." (Brief for Petitioner, p. 22.) Relying on California Evidence Code section 353, petitioner contends that since under that statute a California appellate court cannot reverse a conviction where there has been no objection below, the State Court of Appeal cannot "forgive" the procedural default created by the failure to object at trial. Unfortunately, petitioner's predicate is wrong as a matter of state law.

Petitioner's argument depends on the premise that failure to object is a jurisdictional prerequisite to reversal in California. For so long as the state court had the *power* to reverse, it had the power to "forgive" the default in failing to object. It is quite clear that the failure to object in trial court is not a jurisdictional prerequisite to reversal in California. While the usual

rule is that an objection is required, the rule has numerous exceptions. *See, e.g., People v. Andrews*, 14 Cal.App.3d 40, 92 Cal.Rptr. 49 (1949) (prosecutorial misconduct); *People v. Mahoney*, 201 Cal. 618, 621 (1927) (misconduct of trial judge); *People v. Ibarra*, 60 Cal.2d 460, 34 Cal.Rptr. 863 (1963) (counsel ignorant of the law); *People v. Kramer*, 227 Cal.App.2d, 38 Cal.Rptr. 487 (1964) (defendant representing himself); *People v. Chambers*, 231 Cal.App.2d 23, 41 Cal.Rptr 551 (1964) (one lawyer representing two clients); *People v. Underwood*, 61 Cal.2d 113, 126, 37 Cal.Rptr. 313 (1964) (involuntary confession). Indeed, the California State Assembly Committee's comment to Evidence Code section 353 specifically notes that the section "is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson*, 61 Cal.2d 466, 39 Cal.Rptr 1 (1964)."

In this case the Attorney General pointed out to the state Court of Appeal that there had been a failure to object in the trial court and that that failure should foreclose review on the merits on the direct appeal. (*See* J.A. 181, Respondent's Brief in California Court of Appeal Case No. 5 Crim. 1735, p. 9.) Fully aware of that argument, the State Court of Appeal nonetheless reached the merits. When a state appellate court speaks directly to the merits of an appellant's claim and in no way acknowledges his failure to object in the trial court we submit that it has resolved the objection question as a matter of state law. In such a circumstance this Court should treat the state court opinion as exactly what it purports to be: a ruling on the merits. It is difficult to see how the interests of either federalism or comity are

served by this Court's dismissing as a "gratuity" what to every outward appearance is a state court ruling on the merits. To do so inevitably draws this Court into resolving questions of state law contrary to the state courts themselves.[2]

B. The Court of Appeal's Alleged Failure to Defer to State Court Findings of Fact.

Petitioner has pursued his argument that the federal courts were required to defer to state court findings of fact in much the same "on-again-off-again" fashion as he has his first procedural argument. Although the argument was presented to the District Court (Return, p. 6), it was not offered in the Ninth Circuit until after the Court of Appeals had decided the case. Only at that point was the 2254(d) argument tendered (Petition for Rehearing and Suggestion for Rehearing En Banc, p. 12) and neither the majority nor the dissent in the Court of Appeals ever reached or discussed the contention. Presenting issues for consideration in this cavalier fashion is not, we submit, conducive to orderly decision-making. When an issue is withheld from the

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[2] Even if there was no state exhaustion, counsel's failure to object was not tactically based and therefore constituted "cause" within the meaning of *Sykes*. (*See e.g., United States v. Williams*, 615 F.2d 585, 591 (3d Cir. 1980); *United States v. Barnes*, 610 F.2d 888, 894 n.32 (DC Cir. 1979). The only detail with which Almengor and Allen contradict Childress is that Childress failed to place them at the scene. But there are a variety of other ways they could have been placed at the scene. For example, both told officers they were present and at least in Almengor's case the admission would have been admissible as against his interest. In addition other inmates could have placed them both there since both admitted they were walking shoulder to shoulder with Arias.

Court of Appeals until the case is decided and that Court does not decide the question, this Court has in the past declined to reach it as well. *See United States v. Lovasco, supra*, 431 U.S. at 788-89 n.1. We urge the Court to follow that course here.

In any event, it is perfectly obvious that the Ninth Circuit did not fail to presume as correct any "findings of fact" that may have been made in state court. The state court findings of fact which 18 USC § 2254(d) presumes to be correct are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.' . . . So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense." *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) quoting from *Brown v. Allen*, 344 U.S. 443, 506 (1953) (Frankfurter, J. concurring).

While deference to a state court's determination of the existence or non-existence of primary, historical facts may be dictated by principles of comity and judicial economy (*see West v. Louisiana*, 478 F.2d 1026, 1031-32 (1973) affirmed and adhered to in relevant part in 510 F.2d 363 (5th Cir. 1975 (en banc)), similar considerations obviously do not govern conclusions of federal law drawn from those facts. In the words of the Fifth Circuit in *West, supra*, "comity does not govern the application by federal courts of their independent judgment as to federal law. That is their obligation in all cases. . . ." This view has been uniformly followed in the lower federal courts. *See, e.g., Mason v. Balcom*, 531 F.2d 717, 729 (5th Cir. 1976); *Imbler v. California*, 424 F.2d 631 (9th Cir.

1970), *cert. denied* 400 U.S. 865; *Lamb v. Zahradnick*, 452 F.Supp. 372 (D. Va. 1978).

Consistent with this view, this Court has held that whether counsel undertook multiple representation is not a question of fact (*Cuyler v. Sullivan*, ____ U.S. ____, 64 L.Ed.2d 333, 342 n.5 (1980)), and lower courts have determined that such questions as whether a confession was involuntary (*Gunsby v. Wainwright*, 596 F.2d 654 (1979), *cert. denied* 100 S. Ct. 307 (1980)), or whether suppressed evidence is exculpatory (*Flemmi v. Gunter*, 410 F.Supp. 1361 (D. Mass. 1976)) are likewise not fact findings to which 2254(d) requires deference.

The same principle applies to a conclusion from primary historical facts of whether a given identification procedure is unduly suggestive and this Court has held as much in *Neil v. Biggers*, 409 U.S. 188 (1972). There in an opinion by Mr. Justice Powell this Court reversed the decision of two lower federal courts in an eyewitness identification case over the objection of the dissenters who claimed the majority's action contravened the two-court rule under which this Court traditionally defers to the factual findings of the lower courts. In response, Justice Powell wrote:

> "This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over facts as over the constitutional significance to be attached to them."

A reading of the Ninth Circuit's opinion in this case demonstrates that it was faithful to these principles. All the facts set forth in the opinion are drawn from the

record and do not contradict any finding of primary fact made by the California Court of Appeal. The number of photo spreads shown the witnesses, the actual period of time the witnesses had to view the assailants, the arrangement of photographs in the show ups—all these are primary facts about which the state Court of Appeal made no findings of fact. The conclusions of that court that the identifications were not "suggested" or that the identifications were not the result of "official pressure," or that the procedures were "fair" are precisely those ultimate conclusions of federal law which the federal courts were required to assess anew. If, as petitioner seems to suggest, the state court's conclusion that the procedures were inherently fair is to be deemed correct under 2254(d), the vindication of all federal constitutional rights will be left entirely in the hands of a state court. Because respondent believes no member of this Court is prepared to accept such a novel proposition he is confident the argument petitioner tenders here will be rejected.

II

BECAUSE THE UNNECESSARY FAILURE TO CONDUCT A LINE-UP WAS, ON THE FACTS OF THIS CASE, RELEVANT TO THE QUESTION WHETHER THE WITNESS' IDENTIFICATIONS WERE THE PRODUCT OF SUGGESTION AND WERE UNRELIABLE, THE COURT OF APPEALS PROPERLY CONSIDERED SUCH LACK OF NECESSITY.

Petitioner urges the Court to hold that the availability of the defendant for a physical line-up is never a factor to be considered in passing on the constitutional propriety of a photographic identification procedure. The Ninth Circuit's reliance on that factor in this case,

he argues, "resulted in an erroneous conclusion that the defendant was denied due process of law. . . ." (Brief for Petitioner, p. 31.)

In this section of his brief respondent shows that under this Court's totality of the circumstances test any factor which bears on the reliability of pretrial identification procedures may be considered by a court in passing on the propriety of those procedures. We also show that the use or non-use of a corporeal line-up can be relevant to a determination of suggestiveness and reliability, and that this is an example of such a case. The opinions of this and other courts recognize that identification procedures which would be questionable under ordinary circumstances may be acceptable in the face of exigent or unusual circumstances. In addition, if no reason whatever exists for officers to utilize the most reliable method available, an inference of manipulation may in some cases be justified. Conduct by the police amounting to manipulation of the identification process is and always has been relevant to the ultimate question of reliability. The Court of Appeal properly inquired into the necessity for the authorities to forego a line-up, and properly reversed the conviction.

A. The Totality of Circumstances Test as Applied in This Court and as Understood by the Ninth Circuit Permits Consideration of All Factors Relevant to Reliability.

Manson v. Brathwaite, 432 U.S. 98 (1977), which makes reliability "the linchpin in determining the admissibility of identification testimony" (432 U.S. at 112) holds that reliability is a function of any and all factors which may be relevant to that determination and that each case is to turn on its own facts.

In *Manson* this Court faced a choice between two approaches to the eyewitness identification problem. A reading of the opinion in *Manson* makes it apparent that the Court opted for the choice that was flexible and that would permit a court to consider the great variety of factors that present themselves in individual cases. The "*per se* rule," on the other hand, would have excluded all unnecessarily suggestive identifications without regard to whether they were otherwise reliable. This Court rejected the *per se* rule because "its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant." (432 U.S. at 112.) The "totality of the circumstances" test was described as an "ad hoc" one (432 U.S. at 110), which looked to the five factors enumerated in *Neil v. Biggers, supra*, and noted that these factors "included" those to be considered by a reviewing court (432 U.S. 114). Finally, the court noted that "[a]gainst these [*Neil v. Biggers* factors] is to be weighed the corrupting effect of the suggestive identification itself." (*Ibid.*)

Neil v. Biggers is likewise bottomed on a "weighing [of] all the factors" (409 U.S. at 201) relevant in a given case to the question of reliability. The five considerations listed by *Biggers* were not offered as exclusive ones as this Court made clear when it again noted that "the factors to be considered in evaluating the likelihood of misidentification *include*" the five enumerated factors. 409 U.S. at 199 (emphasis added).

This reading of the totality of the circumstances test is thoroughly understood in the Ninth Circuit. In *United States v. Field*, ____ F.2d ____, (No. 79-1533, 9th Cir. August, 1980), the Ninth Circuit noted this Court's injunction in *Simmons, supra*, 390 U.S. at 384,

that "each case must be considered on its own facts" and stated that Circuit had "followed this articulation of the due process standard [stated in *Simmons*] in numerous cases" including *Mata v. Sumner*, 611 F.2d 754 (9th Cir. 1979), *cert. granted* 65 L.Ed.2d 1139 (1980). *See also, e.g., United States v. Cook*, 608 F.2d 1175 (9th Cir. 1979), *cert. denied* 100 S. Ct. 706 (1980) ("each case must be considered on its own facts"). The *Field* court than made clear the considerations which govern its review of eyewitness identification questions as follows:

> "Our review of the District Court's admission of the in-court identifications . . . focuses exclusively on their reliability. Since '[i]t is the likelihood of misidentification which violates a defendant's right to due process.' [quoting from *Neil v. Biggers, supra*, 409 U.S. at 198] even 'a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.' " [Quoting from *Manson v. Brathwaite, supra*, 432 U.S. at 110.]

Field then set out the five-factor approach of *Manson* and *Biggers* and stressed that the analysis mandated by those cases "includes" but is not limited to those five factors. Any factor, the Court noted, which may be of assistance to a reviewing tribunal and relevant to a given case should be considered in carrying out the *Manson* mandate. In *Green v. Loggins*, 614 F.2d 219, 222 (9th Cir. 1980), the Ninth Circuit made explicit that "the deterrence of [police] conduct is not the primary purpose behind judicial review of tainted eyewitness identification testimony. Rather a court reviews a

challenged in-court identification essentially to determine whether the witness' testimony retains sufficient indicia of reliability." 614 F.2d at 222.

B. Necessity Has Been Considered as Part of the Totality of the Circumstances in the Identification Cases of This and Other Courts.

At the outset it is crucial to understand what this Court did and did not hold on the question of necessity in *Manson v. Brathwaite*, and, more important, in *Neil v. Biggers*. In neither case did this Court hold that necessity may never be considered. Rather, *Biggers* rejected the notion that an unnecessarily suggestive identification by definition and "without more" violates due process. The question *Biggers* addressed was "whether . . . unnecessary suggestiveness *alone* requires the exclusion of evidence." 409 U.S. at 199 (emphasis added). And *Manson* actually appeared to recognize that there can exist factors which may "alleviate" an otherwise suggestive identification.[3] *Biggers* and *Manson* thus clearly do not hold that necessity or the lack of it may not be considered at all, but only that lack of necessity without more and unconnected to considerations of reliability is not a ground for invalidating an identification. Indeed, necessity has been a factor in several of the eyewitness identification decisions of this Court.

In *Simmons v. United States*, 390 U.S. 377, 384 (1968), in assessing the propriety of a photographic

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[3] "The *per se* rule, however, goes too far since its application automatically and preemptorily, *and without consideration of alleviating factors*, keeps evidence from the jury that is reliable and relevant." 432 U.S. at 112 (emphasis added).

identification against the standard there adopted and still in use, this Court stated that "[i]n the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance." And in *Stovall v. Denno,* 388 U.S. 293, 302 (1967) the Court upheld a one-person show-up conducted in a hospital room because "the showing of [the defendant] to [the witness] in an immediate hospital confrontation was imperative."

In rejecting the *per se* rule as overly rigid and automatic, this Court in *Manson* looked to the opinion of Mr. Justice (then Judge) Stevens in *United States ex rel. Kirby v. Sturges,* 510 F.2d 397 (7th Cir.), *cert. denied* 421 U.S. 1016 (1975). *See Manson, supra,* 432 U.S. at 112. There the totality of the circumstances test was divided into three parts as follows:

> "Three different aspects of the 'totality of the circumstances' have been noted in cases testing the admissibility of pretrial identification evidence. The *suggestive* aspects of the procedures were emphasized in *Palmer v. Peyton,* 359 F.2d 199, 201 (4th Cir. 1966) and *Foster v. California,* 394 U.S. 440, 442-43; the *justification* for using a suggestive procedure was the apparent basis of decision in *Stovall v. Denno,* 388 U.S. 239, 302; and the *reliability* of the identification was critical in *Neil v. Biggers,* 409 U.S. 188, 199; and *Coleman v. Alabama,* 399 U.S. 1, 5-6." (510 F.2d at 402-03, emphasis in original, footnotes omitted.)

After noting that there was no justification for failure to conduct a corporeal line-up, the Seventh Circuit stated "But as the Court squarely held [in *Biggers*] these two defects without more, do not necessarily result in a deprivation of due process."

Necessity in one form or another is widely recognized as a factor to be considered as part of the totality of the circumstances. *See, e.g., United States v. Crawford*, 576 F.2d 794, 797-98 (9th Cir.), *cert. denied* 439 U.S. 851 (1978); *United States v. Peele*, 574 F.2d 489, 490 (9th Cir. 1978);[4] *Frank v. Blackburn*, 605 F.2d 910, 913 (5th Cir. 1979) (single person show-up may be made necessary and acceptable by exigent circumstances); *Israel v. Odom*, 521 F.2d 1370, 1373 (7th Cir. 1979) ("If . . . suggestiveness is found, the court must . . . consider whether any unusual or exigent circumstances existed which might, at least in part, have justified the use of the faulty procedures."); *United States v. Dailey*, 524 F.2d 911, 914 (8th Cir. 1975) (lack of necessity to show witness' photographs of defendant prior to trial); *Clemons v. United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230, 1245-46 (D.C. Cir. 1968); *Government of Virgin Islands v. Petersen*, 553 F.2d 324, 327 (3rd Cir. 1977).

These cases make clear, then, that totality of the circumstances is a standard embracing exactly what it means—all circumstances affecting reliability—and that while necessity alone is not a valid basis for reversal it is a factor which can be considered, especially where—as here—necessity and reliability are bound up with one another.[5]

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[4] *See also United States v. Valdivia*, 492 F.2d 199 (9th Cir. 1973), *cert. denied* 416 U.S. 940 (1974); *United States v. Baxter*, 492 F.2d 150 (9th Cir. 1973); *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied* 429 U.S. 1099 (1977); *United States v. Calhoun*, 542 F.2d 1094 (9th Cir.), *cert. denied* 429 U.S. 1064 (1976).

[5] The Fifth Circuit in some of its cases has taken the view that "the fact that there may have been time for a line-up can play

[footnote continued]

While lack of necessity is clearly not *per se* a basis for reversal, and while the existence of necessity will not render "a blatantly suggestive and totally unreliable identification admissible" (*United States ex rel, Kirby v. Sturges, supra*, 510 F.2d at 403 n.15) the propriety of an inquiry into necessity is widely recognized. The reason is not difficult to discern. There is an undoubted law enforcement interest in identification evidence, both to free the innocent and to convict and apprehend the guilty. While there is clearly a line beyond which an identification becomes so suggestive that no amount of necessity will legitimize it, the fact is necessity or the lack of it has been a part of the equation in cases in this Court and the lower federal courts. Second, as we see in greater detail in Argument III, *infra*, the methods employed by law enforcement in conducting eyewitness identifications are relevant both to suggestiveness and reliability. A manipulated procedure can unduly suggest

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no part in whether the photographic spread was impermissibly suggestive." *United States v. Allison*, 616 F.2d 779, 783 (5th Cir. 1980). In that Circuit in assessing suggestibility it is "only the picture spread itself [that] must be evaluated ... – whether other more desirable methods of identification (*e.g.*, a line-up) were available or whether there was a compelling need for speedy identification are just not relevant to a determination of the impermissibly suggestive issue." *United States v. Sutherland*, 428 F.2d 1152, 1156 (5th Cir. 1970), *cert. denied* 409 U.S. 1078 (1972); *United States v. Ballard*, 423 F.2d 127 (5th Cir. 1970). But *see Frank v. Blackburn, supra*, 605 F.2d 910. And *see also United States v. Marchand*, 564 F.2d 983, 995 (2d Cir. 1977), *cert. denied* 434 U.S. 1015. This formulation, taken literally, may well go too far. It is of course true that if a reliable method of identification has been used it ought not to matter that a more reliable method could also have been used. But it does not follow that where the more reliable method is in fact the only reliable method, that a court cannot consider (a) the failure to employ the more reliable method and (b) the absence of necessity to by-pass that method.

an unreliable answer to the witness. Where the most reliable method of identification is deliberately by-passed by the police for no reason whatever, an inference of manipulation may be justified.

With these considerations in mind we now examine the relevance to reliability in this case of the unnecessary failure to hold a line-up.

C. On This Record, The Unnecessary Failure To Conduct A Line-up Was A Factor Related To Reliability.

It is generally recognized that a line-up is a more reliable method of identification than a photographic display. See Wall, *supra; Simmons v. United States, supra*, 390 U.S. at 383; *see* Grano, *Kirby, Biggers* and *Ashe: Do Any Constitutional Safeguards Remain Against Convicting The Innocent?* 72 Mich. L. Rev. 717, 769 (1974); Libling, *The Use of Photographs for the Purpose of Identification*, 1978 Crim. L. Rev. 343, 345; Williams and Hammelman, *Identification Parades*, 1963 Crim. L. Rev. 479 484; Comment, *Photographic Identification: The Hidden Persauder*, 56 Iowa L. Rev. 408 (1970); Comment, 1972 Utah L. Rev. 100, 104.

In this case that assessment is borne out by the statements of the witnesses themselves. In the first place both witnesses complained repeatedly about the quality of the photographs.

The inadequacy of the photo spread was explained to the officers again and again. Both Allen and Almengor complained of the age of the photos (J.A. 97-8, 79; RT 715-16, 595-96), of the changed appearance that might have taken place because of the age of the photos, of the fact that they could not tell the height and body

build of the assailants from the photos, of the fact that the photographs altered the complexion of the assailants, of the fact that the photos were in black and white rather than color (J.A. 62; RT 424-25).[6] In light of these limitations and even after having seen the last photo spread (Exh. 24), Almengor insisted on seeing a corporeal line-up (*see* RT 716, 721).

Second, Almengor testified repeatedly that *he needed a physical line-up in order to make a positive identification.* The transcript of this trial is replete with references by Almengor that he could not make a positive identification from photographs and that he needed to see a line-up. He stated:

> "I never made a positive identification [from the photographs]. I told [the officers] that until I see the men, I will [not] be able to give a full, positive identification." (J.A. 63-4; RT 437:9-11.)

And again

> "Q. Okay and you said that you couldn't be positive unless you saw them [the defendants] in a line-up. Right?
>
> "A. Yes, sir." (RT 437:18-20.)

And again

> "I never made a positive identification. I told Lt. King 'when I see the men before me present at the preliminary, I'll be able to give you a full identification, unless you want to show me a line-up.' " (J.A. 67; RT 457:11-14.)

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[6] As to the relatively greater reliability achieved through use of color photographs rather than black and white ones, *see* Sussman, Sugarman, & Zavala, *A Comparison of Three Media Used in Identification in Personal Appearance Identification* XI-7 A. (Zavala Ed.) (1970) discussed in Grano, *supra*, 72 Mich. L. Rev. at 768-69.

And again

"Q. Did you tell them [the officers] you weren't making any positive identification and you wanted to see the person in person?

"A. Yes, sir.

"Q. You wanted to see a line-up?

"A. Yes, sir.

"Q. And was anything said to you about providing a line-up to you?

"A. Yes, sir. They were going to provide a line-up, and then something came about, and they did't ever—it never came. I just didn't say nothing about it no more." (J.A. 71; RT 496-97.)

And again

"Q. Am I correct that you asked the prison officials if you could see these people in person?

"A. Yes, I wanted to see them in person.

"Q. Were you ever given the opportunity to see them in a line-up?

"A. No, sir." (RT 425:9-14.)

This testimony was confirmed by the investigating officer (RT 932:12-14) and by a tape of an interview Almengor gave correctional authorities during the investigation. (RT 783.)

Third, this record contains proof of the importance of a line-up to a reliable identification. After having tentatively identified Vargas from Exhibit 24 on October 30, 1972,[7] Allen and Almengor left the room and

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[7] It is worth noting in the case of Almengor that Vargas was identified on October 30 only because he had been identified in

[footnote continued]

were being escorted back to their cells when they saw Vargas in the shower. At that point, the witnesses with Vargas before them knew immediately that their photographic identification had been erroneous and they so informed the correctional authorities. (J.A. 72; RT 500-02.)

The witnesses' combined insistence that the photographs they were presented with were inadequate, their statements that they needed to see the defendants in a line-up in order to make a reliable identification, and their recanting of their identification of Vargas upon seeing him before them were all facts affecting the reliability of the photographic spread itself. It is absurd to suggest—and this Court has never suggested—that under these circumstances the failure to conduct a line-up could not be considered as part of the suggestiveness-reliability equation. And once it is conceded that failure to conduct a line-up is a factor tied to reliability, necessity must also be considered. For, as already noted, exigent circumstances and police manipulation can both be relevant to the propriety of identification procedures.

This record makes it perfectly obvious that there was no reason whatever not to give the witness the line-up he told the officers he needed to make a reliable pretrial identification.

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previous photographs (RT 463). Thus however old were the photographs and however different were the appearances of the defendants between the time their pictures were taken in Exhibits 23 and the time they were taken in Exhibit 24, their appearances were not sufficiently different to prevent Almengor from identifying Vargas.

The dissenting opinion below and petitioner both base their argument that necessity existed in this case on the conditions which existed in Tehachapi immediately following the incident, and on the need to maintain the anonymity of potential eyewitnesses. Whatever their general merit, these contentions are belied by the record in this case.

In the first place, prison riot conditions to the contrary notwithstanding, in creating the photographs for Exhibit 24 officials at Tehachapi risked no greater disruption than if they had actually conducted a line-up. For in order to compile the photographs for Exhibit 24 the officials first brought some 15 inmates from their cells and had each photographed. They then took the three defendants out again and had them each separately photographed. (RT 716-18.) It is difficult to understand why, having gone this far, the officers were unwilling to place the same or a series of smaller groups in physical line-ups.

Second, anonymity of the witnesses could have been assured by any number of simple devices such as a sheet or a piece of plywood with a hole in it, or by a properly placed mirror. Moreover, here we have three witnesses who were removed to segregation precisely because they were already *known* to the remaining inmate population as potential informants.

This is not a case where the photo spreads were all shown immediately after the crime or where there was a pressing need to move quickly to aprehend the suspect. *See, e.g., Stovall v. Denno, supra; Mock v. Rose*, 472 F.2d 619, 621 (6th Cir. 1972), *cert. denied* 411 U.S. 971 (1973). Here photographs were continuously shown to the witness over a period of 11 days

from the killing of Arias and while all potential suspects were incarcerated and could not flee. Moreover, from October 20th on when Childress came to the officers, three suspects were apprehended and known to the police. Nor is this a case in which the witness could not participate in a line-up (*see Stovall*), or where there were no suspects comparable in appearance to the defendants to place in the line-up (*cf. Smith v. Coiner*, 473 F.2d 877, 881 (4th Cir. 1973), *cert. denied* 414 U.S. 1115 (1974).

Whatever the realities of prison life and whatever the flexibility that must be accorded prison officials in maintaining order and discipline in prison, the state can have no interest in the use of procedures which lead to the conviction of innocent people, whether they are inmates or not. Indeed, the hostilities, tensions, and potential for retaliation that can be created when the wrong man is convicted in prison argue strongly that prison order is actually undermined by the use of procedures which create a likelihood an innocent person will be convicted.

III

THE COURT OF APPEALS PROPERLY CONSIDERED POLICE CONDUCT TENDING TO FOCUS THE WITNESS' ATTENTION ON A PARTICULAR SUBJECT.

Respondent also contends that it was improper for the Court below to consider either "conduct on the part of the police tending to focus attention of [sic] a particular subject" or "presence or absence of other witnesses at the time of the improper identification and the possible prejudicial influence of one witness' opinion on another's recollection." (Brief of Petitioner at p.

46, quoting from *Parker v. Swenson*, 332 F.Supp. 1225, 1230-31 (E.D. Mo. 1971), *cert. denied* 409 U.S. 1126 (1973).) The presence of other witnesses was in actuality not considered by the Court below, although because this Court considered precisely this factor in *Manson v. Brathwaite, supra*, 432 U.S. at 116,[8] there is nothing improper about doing so in the right case.

Petitioner's position with regard to both factors results again from his overly rigid interpretation of this Court's opinions in *Manson* and *Biggers*. As we have already seen, the five-factor test of those cases is a flexible one which permits a court to consider any matter relevant to the question of reliability. Against the five factors must be weighed "the corrupting effect of the suggestive identification itself." (432 U.S. at 114.) Obviously relevant to whether the effect is, in fact, "corrupting" is the conduct of the police in focusing a witness' attention on the accused. No one would seriously contend, for example, that a court should be powerless to consider the fact that while presenting the witness with a photographic display that is fair on its face, a police officer was pointing to the picture of the accused and telling the witness that the accused is in fact the culprit. While a court may not examine police conduct for the purpose of deterring it, it is required to do so in order to decide whether the conduct impermissibly suggested an identification to the witness and hence undermined the reliability of the witness' identification.

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[8] ". . . [S]ince Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another."

This Court's eyewitness identification cases recognize the relevance of police conduct and are filled with concern for procedures used by the police. In *United States v. Wade*, 388 U.S. 218, 228 (1967) the Court stated that "a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." In *Coleman v. Alabama*, 399 U.S. 1, 6 (1970) the court rejected an eyewitness identification contention noting that "the record is utterly devoid of evidence that anything the police said or did prompted [the witness'] virtually spontaneous identification of petitioners. . . ." And in *Simmons v. United States, supra*, 390 U.S. 377, 385 the court noted: "Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation or that the FBI agents in any other way suggested which persons in the pictures were under suspicion."

Lower federal courts have likewise looked to actions by the police in presenting a photographic display as part of the manner in which the prosecution presents the suspect to the witness for pretrial identification. Thus the Fifth Circuit in *Frank v. Blackburn, supra*, 605 F.2d 910, 913 upheld a conviction in part because "there were no words or actions by police aggravating the suggestiveness of the confrontation." *Accord United States v. Sanchez*, 603 F.2d 381 (2d Cir. 1979) (question is whether police practices corrupted the identification); *United States v. Mears*, 614 F.2d 1175, 1177 (8th Cir. 1980) ("a display is not impermissibly

suggestive where the agent does not direct the witness' attention to any particular photo"); *United States v. Dailey, supra.*

It is also widely recognized among psychologists that "the expectations or hypotheses of an authority can influence the behavior of others" and that police practices in conducting pretrial identification procedures afford a classic opportunity to transmit those influences to a witness. *See* Yarmey, *The Psychology of Eyewitness Testimony*, 154 (1979).

The Ninth Circuit has spoken most cogently to this contention in *United States v. Field, supra.* There the court analyzed the so-called *Parker* factors along with the test set forth in *Manson* and *Neil* and concluded there simply was no conflict between them. This analysis, we submit, is correct and was correctly applied here. It recognizes that suggestiveness is a treshhold consideration and that reliability is the central concern. It also acknowledges that any factor relevant to suggestiveness or reliability is useful to a court in discharging its *Biggers-Manson* mandate. An examination limited solely to the photo display itself without conduct associated with the display, such as gestures or words by the police pointing to a given suspect or conversations among the witnesses which "persuade" some of them that a given suspect is the culprit, overlooks clearly relevant matters. The underlying question, after all is, whether the person being identified is being chosen on the basis of the witness' recollection of past events or because the identification was planted in the witness' mind by someone else.

Again, because it contains extensive evidence of suggestive police practices, the present record illustrates the point.

Both the District Court and the Court of Appeals recognized, in the words of the District Court, "that irregularities occurred in the pretrial photographic identification." (Appendix to Petition for Certiorari, D-3. *See also* A-6 through A-11.) These conclusions are amply supported by the record. The suggestiveness of the identification procedures used in this case is a function of several factors which tended to point the witnesses away from a selection of the choices which they would have made on their own and toward a desired result.

First, as already pointed out, notwithstanding the witnesses' insistence that the photographs being presented to them were for one reason or another inadequate and unreliable, and notwithstanding Almengor's repeated statements that he could not make a proper identification without a line-up, no such line-up was held. Since there was no reason for failure to hold the line-up, we can only conclude the action in failing to assemble one was deliberate. Once it became apparent to the investigating authorities that the chance physical display of Vargas to Allen and Almengor had changed the witnesses' minds and that they had retracted their identification of Vargas, the failure to conduct a line-up became, frankly, unforgiveable. Failure to hold a line-up constituted one sign among many that the authorities were interested in obtaining the identification they preferred rather than in the one the witnesses were prepared to give them.

Second, the officers informed Almengor that all of his initial choices had been "wrong." Following a careful and deliberate review of many pictures on October 19 (RT 779) Almengor selected four individuals as the culprits: "Bogus Pete" Nunez, Vargas and two other inmates named Ramirez and Reymundo (RT 399-400, 766, 914-15). The identification of Nunez had several important indicia of reliability. Almengor's identification of his was "positive" (RT 711). Nunez was chosen after Almengor had overheard talk among people in the dormitory that Nunez had actually committed the crime. Following these conversations Almengor in point of fact selected Nunez's photograph even though the names on all the photographs were not visible and even though Nunez's appearance on October 19 was different from the way he appeared in the photographs.[9] Even though Almengor's independent

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[9]Nunez apparently had longer hair on October 19 than in the photograph and he did not have a moustache in the photograph but did on October 19. (RT 712.) In this respect his situation was exactly the same as Mata's.

A study of the record reveals a strong likelihood that the identification of "Bogus Pete" Nunez was, in fact, reliable. Although, Officer King told Almengor that Nunez was on outside work crew on the afternoon of October 19, 1972, there is actually a strong indication that Nunez was still on the prison grounds at the time Arias was killed.

Prosecution witness Officer Thompson, who was head of the outside work crews at Tehachapi on October 19, 1972, testified that there was a standing order for his work crews to leave the prison gates by 1:00 p.m., daily (RT 772). Despite the standing order, however, occasionally the crews left later than 1:00. (RT 774.) Thompson never checked his crew book, on October 19 or any other date, to determine who was on his crew, and what time the crew actually left prison grounds. (RT 775.) The crew book in which were kept official records of all people going out

[footnote continued]

identification of Nunez corresponded with an apparent consensus among other inmates and was made notwithstanding important differences between Nunez's appearance on October 19 and his appearance in the photographs, the police rejected the identification and *told Almengor they were rejecting it.* Officer King testified:

> "I told Mr. Almengor that Bogus Pete Nunez could not have been involved in the incidents since we knew that he was outside the security area on a work detail at the time of the incident." (J. A. 95-6; RT 713.)

In *United States v. Field, supra,* a witness to a bank robbery was shown a photographic spread. According to the court "[w]hen shown the photo spread and asked to identify the man he had seen in the bank, Kotzen [the witness] selected a photograph other than Field's [the defendant's] photograph. The agent told Kotzen that his selection was wrong and Kotzen then selected Field's photograph." The court included this conduct among its reasons for holding "that the pretrial focusing on Field outweighs any indicia of reliability detected in Kotzen's identification." *United States v. Field, supra.* Obviously, if investigating authorities are aiming for an identification which is derived wholly from the witness and is not the product of their own suggestion, they will not inform the witness that he has made a "wrong

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with Officer Thompson, and the times of departures and returns, was lost. (RT 774.) No verification from prison records can be made as to whether Nunez was actually on the work crew of October 19, 1972, and/or what time the crew left the grounds.

Furthermore, the testimony of Carlos Ortega places Nunez in the dormitory at or near the time of the killing (RT 832), and in testifying about the killing in another proceeding in April, 1973, Ortega implicated Nunez. (RT 872.)

choice." In fact, in such a situation there would be no concept of a wrong choice.

Third, the officers removed all selections they regarded as "mistaken" from all subsequent displays. After Almengor "misidentified" Nunez, Reymundo, and Ramirez, and identified Vargas on October 19, the officers removed the photographs of Nunez, Reymundo, and Ramirez from all future displays and none of the three ever appeared again (RT 925) (Exhibits 23, 24).

This conduct is especially difficult to understand because while there was an assertion that Nunez could not have participated in the killing because he was outside the grounds (but *see* discussion *supra*) there is no explanation for why the officers no longer regarded Reymundo and Ramirez as suspects. That the investigating officers were not interested solely in removing tentative or uncertain identifications is demonstrated further by the fact that Vargas' photograph was not removed notwithstanding the equally tentative and uncertain nature of Almengor's identification of him. The only reason Vargas' photograph would have been retained and the others eliminated is that the investigating officers had a belief in Vargas as a suspect which they sought to transmit to or have confirmed by Almengor.

Fourth, while removing wrong identifications the officers continued to show the photographs of the defendants in all three photo spreads. The continued and recurrent use of a defendant in a series of corporeal or photographic displays has been condemned by this Court in *Foster v. California*, 394 U.S. 440, 443 (1969) and in *Simmons v. United States, supra*, 390 U.S. at 384 where the Court noted that the danger of improper

suggestion "will be increased if the police show [the witness] the pictures of several persons among which the photograph of a single . . . individual recurs." The effect of previous exposure to a photograph on a subsequent corporeal identification has also been noted in the literature. *See, e.g.*, Loftus, *Eyewitness Testimony*, 150-52 (1979) (photo-biased line-ups). In such a situation the subtle but real cumulative effect of suggestion is apparent.

The photographs of Mata, Vargas, and Gallegos recurred in all displays while other supposed misidentifications were removed. While the appearances of the defendants had changed by October 19, Almengor was still able to identify Vargas from old photographs and was prepared to make an identification of Nunez notwithstanding that he like Mata had grown hair and a mustache after the taking of the original photographs. In addition, between October 19 and October 30 all defendants were in segregation with the witnesses and could be seen on a daily basis taking exercises. It is no wonder therefore that by the time Almengor had seen Mata's photograph for the third time on October 30 this identification became "certain."

Fifth, the record strongly suggests that the witnesses were permitted to view the three defendants and only three defendants before they were rephotographed on October 27. The evidence revealed that after Almengor expressed difficulty making an identification from photographs, the authorities undertook an elaborate plan to present a series of new photographs to the witnesses. To accomplish this they brought approximately 15 inmates to be photographed but the inmate photographer taking the pictures in some way erred and the

photos did not come out. The authorities then brought Mata, Gallegos, and Vargas, and only these three, back to be photographed again on October 27.

While Almengor and Allen professed at trial not to recall seeing the three being taken out to be photographed the record as a whole strongly suggests otherwise. At the preliminary hearing Almengor specifically stated that he saw all three being taken out together on October 27 and prior to trial (*See* RT 445-46). Allen told James Faulkner, a licensed defense investigator appointed by the court, that "at the time these defendants were taken out to be photographed they were the only ones taken out of segregation to be photographed. And, apparently, there was [sic] some recent photographs taken. So he [Allen] assumed that since they were the only ones in segregation that they were on the chart, the photographic chart he was shown at a later time—that they must be the ones that did it." (J.A. 177; RT 1119.)

These exposures of the defendants to the witnesses prior to the photographic displays were highly suggestive. Permitting the defendant to be seen prior to the witness' attempt to identify him under conditions which suggest he is a suspect is a technique which has been widely condemned both by this Court (*United States v. Wade, supra*, 388 U.S. at 234), the lower courts (*United States v. Field, supra; Green v. Loggins, supra*, 614 F.2d at 223), and the commentators, (*see* Wall, *supra*, at 48; Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 Col. L. Rev. 94, 99 (1966).) The suggestive power of such an exposure is obvious and leaves the witness with the precise conclusions Allen claimed he was led to in this case.

For all these reasons the identification procedures were suggestive and the Court of Appeals was justified in considering them.

IV

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE IDENTIFICATION IN THIS CASE WAS UNRELIABLE.

Having shown that the Court of Appeals considered proper factors in passing on the questions of suggestibility and reliability and that the identification procedures were suggestive, we now examine this record to determine whether, notwithstanding the suggestiveness, the identifications were unreliable and gave rise to a substantial likelihood of irreparable misidentification.

A few preliminary considerations are important. First, as we have seen, while some physical evidence was recovered, there was virtually none which linked the defendants with the crime. The case therefore depended on the eyewitnesses. Second, these witnesses were extraordinarily unsympathetic and unreliable.

Almengor himself was a suspect in the case because he attempted to hide blood soaked clothing and did not approach the police until confronted with the clothes. He was also near-sighted and was not wearing his glasses on the day of the attack, was an inveterate glue sniffer, and testified under promises of leniency. Allen was likewise testifying under promises that he would be considered for an earlier parole, he was a member of the Nuestra Familia, had failed to make any identifications until October 30 and was, as Judge Sneed recognized in his dissent below, a rank opportunist. Thus, for example, while he and Almengor both knew

they had misidentified Vargas. Allen said nothing to the authorities about it. When asked if he had spoken up he answered "no, I just kept it to myself . . . I mean what good would it do me to tell anybody?" (J.A. 82-3; RT 623.)

In addition these identifications bear several important signs of unreliability.

First, the initial identifications—a strong indication of reliability—were in both cases suspect. Allen first claimed he could see nothing, that the attack had happened so fast he was unable to view the incident, and that he could make no identification whatever. He confirmed this in his statements at the preliminary examination, at trial, and in his statements to Investigator Faulkner. He told Faulkner, for example, that he could not recall if the assailants had mustaches, if they were Mexican or Caucasian, or what they were wearing. (RT 633.) Almengor on the other hand made three "wrong" choices in his first attempted identification, failed to make any identification of Mata in the second photo display, and finally chose Mata only on the third time. As soon as both witnesses were exposed to a physical view of one of the defendants, they retracted the identification and continued to maintain they had misidentified Vargas.

An important part of the Court's determination in *Biggers* that the identification had been reliable was the fact that "the victim made no previous identification at any show-ups, line-ups, or photographic showings. Here record for reliability was thus a good one, as she had previously resisted whatever suggestiveness adheres in a show-up." 409 U.S. at 201. The accuracy and specificity of the initial identification has long been

recognized as an important part of the reliability analysis mandated by *Biggers* and *Manson*. Thus, Wall, *supra*, lists as one of the "danger signals" which "should give warning that the identification may be erroneous" the following two: (1) "The Witness Originally State That He Would Be Unable to Identify Anyone" and (2) Before Identifying the Defendant at the Trial, the Witness Erroneously Identified Some Other Person." (Pp. 90, 101.) Each danger signal is present in this case. Allen stated he would be unable to identify anyone and Almengor "misidentified" three individuals at the initial identification. Thus in contrast to the witness in *Biggers*, the "record for reliability" of these witnesses was extremely poor.

Second, neither witness enjoyed a good opportunity to view the defendants. Allen was distracted altogether. According to Allen's testimony he was "glancing up" while buttoning his denim jacket when the attack on Arias broke out. (J.A. 80, 75; RT 612, 586.) Once the fight started, Allen's main purpose was "trying to keep from getting killed." Allen testified that "well, the other two [referring to Mata and Gallegos] I couldn't see that good" (J.A. 76; RT 587). The third man (Vargas) leaped at Allen and jabbed his knife toward him, cutting Allen's sleeve and scratching the skin on his forearm. (J.A. 78; RT 588.) Allen stepped back a few steps and started yelling for help. (RT 589.) As he did so, he noticed Almengor fighting "with someone" but he did not know with whom. (RT 589.) Allen did not even know where Almengor was when the correctional officer arrived at the scene as the fight broke up. (RT 590.) Allen testified that his attention during the fight was drawn to the man with the big knife.

"A. I was looking at the man with the big knife.

"Q. You got a good look at him?

"A. Yeah, I seen him.

"Q. And he pretty well occupied your attention from then on didn't he?

"A. That's right.

"Q. And were you looking at the knife or did you get a good look at his face?

"A. No, I was looking at the knife." (J.A. 80; RT 614.)

Allen testified further that he essentially never took his eyes off the man with the big knife. (J.A. 81; RT 617.) And even as to this man, Allen's identification was so uncertain that he subsequently retracted it and maintained through the trial that Vargas was in fact innocent.

Almengor's opportunity to view was not considerably better. Almengor testified that before the attack, he had been anticipating trouble. (RT 413.) Almengor was walking with the victim, Arias, toward a bulletin board just outside the dormitory. Almengor testified that Arias was talking to him as they were walking. (RT 390.) Although Almengor noticed three inmates standing by the bulltein board, he "didn't pay them no attention. . . . Well, I wasn't really noticing if there was anybody else around. My attention was if I seen any Mexican guys inside the dorm because that's the real danger I had my eyes on." (J.A. 61; RT 415.) The three inmates, according to Almengor, were looking at the bulletin board, with their faces turned toward the board and away from Almengor. (RT 415.) Although

Almengor is nearsighted, he was not wearing his glasses. The inmates who were standing by the bulletin board, turned around "real fast" (J.A. 37; RT 376). Almengor took a few steps away from the victim (J.A. 38; RT 377). As the attack on Arias started, the only inmate Almengor was looking at was the "third man," the "tall one," thought to be Vargas. Almengor testified to staring at this third man as the man pulled a knife out of Arias' back. (RT 418.) Almengor stated that the third man was the person he remembered most clearly from the fight. (RT 420.) As the fight broke out, Almengor looked over at Allen, and saw the third man "slooped and pulled away . . ." (RT 379-80) from Arias, saw stabbing motions being made quickly at Arias, and heard Allen screaming for people to come and help. (RT 383.) At this same moment, Almengor testified, respondent appeared to "rush me with a knife" (J.A. 42; RT 380). Almengor defended himself by blocking the blow and throwing a kick which pushed respondent quickly to the door at the other end of the corridor, at least six feet away. (RT 380.) Respondent then turned and ran out. As he was running away, his back was toward Almengor.

Although Almengor had face-to-face contact with respondent, it was for only a very few seconds, and was during a highly charged, fast-moving fight, which by Almengor's own testimony, lasted but a few moments. Almengor stated that the "third man," on whom he was concentrating, and whom he saw stab Arias, was the one inmate he had the best opportunity to view. (RT 420.) With the exception of the brief moment of eye contact which occurred in the midst of great commotion, Almengor was never paying attention to respondent.

Both of these observations were made under conditions of extreme stress, conditions which have been shown to cause poor performance in simulated eyewitness identifications. Loftus, *supra, Eyewitness Identification*, at 153-56 and *see* Uelman, *Testing the Assumptions of Neil v. Biggers: An Experiment in Eyewitness Identification, supra*, 8 Crim. L. Bull, 358 (1980).[10]

Third, the prior descriptions by both witnesses were not only mistaken but very vague.

Almengor's prior description of respondent is devoid of any significant detail. When Almengor described respondent as wearing denim blues and a prison issue hat (RT 376) he could have been talking about the entire population of Tehachapi. This part of his description is therefore meaningless. Almengor also noted only that respondent had a thin moustache and wore black leather gloves. But even this description was inaccurate since Exhibit 24 reveals that respondent's moustache on October 19 was in fact full and bushy.

Allen's description of Mata was, like Almengor's quite vague: state clothes, moustache, state-issued beanie, and gloves. (RT 621-22.) In addition, Allen had stated at one point that he did not get enough of a look at the attackers during the fight to make any reliable identifications. (RT 630.) Despite the fact that Allen had known respondent personally, before the stabbing incident (RT 595), he had neither been able to name him nor to give a detailed description of him. (RT 595.) Allen told a defense investigator that he

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[10]In this article the author, a law school professor, tested the abilities of law students accurately to identify a man and a woman involved in a simulated, unannounced fracas in his class. The rate of erroneous identifications was in excess of 70%.

made a positive identification of respondent only after the prison officials reminded him he was coming up for parole. (RT 634.35.)

Fourth, neither witness demonstrated a high level of certainty at the time of the final identifications. As we have seen, Allen had earlier indicated that he could not make any identifications and Almengor's previous identifications had all been wrong. In addition, despite the fact that they were prepared to make an identification of Vargas on the 30th of October, when they saw Vargas in person immediately after having made the identification they retracted it.

Eleven full days passed between the time of the incident and the time of the final identification. Much has been written on the effect of the passage of time on the retention of information in memory. *See, e.g.*, Loftus, *supra, Eyewitness Testimony*, 65 and studies there cited; Yarmey, *supra, The Psychology of Eyewitness Testimony*, ch. 4. Among many studies noted bt Loftus, *supra*, is one in which she and others demonstrated that by the time two days had passed between the incident and the identification, subjects asked to retain significant details of a previously presented event were performing at about a 50% rate, a figure which, the study concluded, "means that the subjects are simply guessing." Loftus at 65. These performances were noted over intervals of time during which no additional information was introduced to the subjects. That of course was not the case here. Almengor was told that he had previously made wrong choices and those wrong choices were removed. He was also shown a series of photographs containing the pictures of the defendants over and over again.

So unreliable were the identifications that the prosecutor was forced to acknowledge in his opening statement that the witnesses had "had difficuty identifying the assailants." (J.A. 6; RT 223.) In Wall's classic account, *Eyewitness Identification in Criminal Cases*, there are listed twelve "Danger Signals" which "should give warning that the identification may be erroneous." Eight of them apply to this case.

Here one witness originally stated that he would be unable to identify anyone and another erroneously identified other inmates. Although Allen knew the defendant prior to the crime he made no accusations against him when questioned by the police. Discrepancies existed between the witness' original description of the perpetrator of the crime and the actual description of the defendant. Almengor had erroneously identified three other inmates, one of them "positively," before naming Mata. The witnesses had a limited opportunity to see the defendant. A period of eleven days elapsed in the identification. The crime was committed by a number of people.[11]

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[11]The complete list is as follows:

"The Witness and the Person Identified Are of Different Racial Groups; During his Original Observation of the Perpetrator of the Crime, the Witness Was Unaware That a Crime Situation Was Involved; A Considerable Period of Time Elapsed Between the Witness's View of the Criminal and His Identification of the Defendant; The Crime Was Committed by a Number of Persons; The Witness Fails to Make a Positive Trial Identification; The Witness Originally Stated That He Would Be Unable to Identify Anyone; The Identifying Witness Knew the Defendant Prior to the Crime, But Made No Accusation Against Him When Questioned By the Police; A Serious Discrepency Exists

[footnote continued]

The conclusions drawn by the Court of Appeals from this record are all amply supported and its judgment, therefore, must be affirmed.[12]

Between the Identifying Witness's Original Description of the Perpetrator of the Crime and the Actual Description of the Defendant; Before Identifying the Defendant at the Trial, the Witness Erroneously Identified Some Other Person; Other Witnesses to the Crime Fail to Identify the Defendant; Prior to Trial the Witness Sees the Defendant But Fails to Identify Him; Before the Crime Was Committed, the Witness Had a Very Limited Opportunity to See the Defendant."

[12]Petitioner makes no argument here that any error that may have been committed was harmless beyond a reasonable doubt. Clerely it was not. The case was based solely on eyewitness testimony. Of the three eyewitnesses who testified, only Childress' testimony was untainted, and even his testimony was weak. As developed more fully in the statement of the case, *supra*, while Childress claimed to have had a clear view of the incident, he stated that only the three defendants were present. Yet Allen and Almengor placed themselves at the scene as well. In addition, his bunk-mate testified Childress was actually playing cards with him at time of the killing and could not have seen the stabbing. While respondent has not challenged Childress' identifications, they were less than solid. First his account of the identification procedures and Officer Mills' differ in important respects. (*Compare, e.g.*, RT 285-86 with RT 688.) Second, at least according to the investigating authorities, Childress' own identification was made from single, isolated pictures of Mata and Gallegos. (RT 688.) He described Gallegos as with a moustache—which was apparently untrue. (*See* Exhibit 24.) Moreover, even if Childress' testimony was wholly reliable, the jury was confronted with a case in which two of three eyewitnesses had made constitutionally suspect identifications. The Court of Appeals was correct in concluding that error committed under such circumstances cannot be harmless.

CONCLUSION

Those involved in the trial of criminal cases have long known that faulty eyewitness identifications are responsible for the conviction of many innocent people. *See, e.g.*, Borchard, *Convicting the Innocent* (1933; repr. 1961); Frankfurter, *The Case of Sacco and Vanzetti* (1927; repr. 1962). Recent studies confirm both the inherent unreliability of eyewitness identifications and the prejudicial impact such identifications tend to have upon juries. *See, e.g.*, Loftus, *supra*; Uelman, *supra.* Daily stories such as those of a priest who was wrongly accused of robbery on the basis of no fewer than seven "eye-witnesses" illustrate the persistence of the problem. (*See* Buckhout, The Mistaken Seven: *Eyewitness Identification of the "Gentleman Bandit,"* 7 Crim. Defense 5 (1980).) Against this background the Court of Appeal conducted a careful review of this record, and arrived at the only plausible conclusion:

In the chaos and confusion at Tehachapi on October 19, 1972, the need to isolate *some* culprits unfortunately overwhelmed the duty to isolate the *right* ones. The Court of Appeals acted responsibly in the face of this fact. In so doing, the Court of Appeals remained faithful to the teachings of this Court and its judgment must, therefore, be affirmed.

Respectfully submitted,

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